Docket: 2017-1882(IT)G

BETWEEN:

RICK HANSEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 24, 25, 26 and 27, 2019, at Ottawa, Ontario

Written submissions filed by the parties on September 2, 2020.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the Appellant:	Susan Tataryn Asha Bradford
Counsel for the Respondent:	Ana-Maria Tarres

JUDGMENT

The appeal, from the reassessments made under the *Income Tax Act (the "Act")* for the 2007, 2008, 2009, 2011 and 2012 taxation years, is allowed and the reassessments are referred back to the Minister of National Revenue (the "Minister") for reconsideration and reassessment on the basis that:

- The respondent did not establish that the appellant made any misrepresentation that is attributable to neglect, carelessness or wilful default as contemplated by subparagraph 152(4)(a)(i) of the *Act.* Therefore, the Minister did not have the authority to reassess the appellant after the normal period for reassessment for the sales transactions that occurred in 2007, 2008 and 2009 taxation years, namely, with respect to the Lakeforest, Pebblewoods and

Meadowshire (defined hereafter as "Meadowshire 1") houses. As a result, the appellant's claim for the principal residence exemption for these taxation years stands.

- The appellant is not entitled to claim the principal residence exemption for the sale transactions that occurred in 2011 and 2012 taxation years, namely, with respect to the Cedardown and Kilbirnie houses. As a result, the said transactions should be taxed pursuant to subsection 9(1) of the *Act*. However, the Minister has to take into account, that Ms. Weiland co-owned these houses. Accordingly, Mr. Hansen should be taxed on 50% of the net proceeds.

- In calculating the adjusted cost base for the Cedardown house, an additional amount of $8,531 is allowed as expenses.

- In calculating the adjusted cost base for the Kilbirnie house, an additional amount of $54,387.53 is allowed as expenses.

- The penalties levied by the Minister for the taxation years 2007, 2008, 2009, 2011 and 2012 are waived.

- The management fees in the amounts of $6,600 paid by the appellant to his spouse Ms. Tania Weiland are deductible with respect to the 2009 and 2011 taxation years.

- The advertising expenses in the amount $878 are deductible for the 2009 taxation year.

In all other respects, the reassessments for the 2007, 2008, 2009, 2011 and 2012 taxation years remained unchanged.

The parties will have 30 days from the date of this Judgment to make submissions with respect to costs. Each party will have a further 10 days thereafter to file any responding submissions. If the parties do not advise the Court that they have reached an agreement and no submissions are filed by the appellant, costs shall be awarded in the amount set out in the Tariff of the *Tax Court of Canada Rules, (General Procedure)*.

Signed at Ottawa, Canada, this 14th day of September 2020.

"Johanne D'Auray"

D'Auray J.

Citation: 2020 TCC 102
Date: 20200914
Docket: 2017-1882(IT)G

BETWEEN:

RICK HANSEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

D'Auray J.

I. OVERVIEW

[1] The issues in this appeal arise from the sale of houses by Mr. Hansen and his spouse, Ms. Tanya Weiland ("the Hansens") during the taxation years 2007, 2008, 2009, 2011 and 2012. The Hansens sold a house during each of these taxation years. Mr. Hansen claimed the principal residence exemption with respect to the disposition of the houses pursuant to paragraph 40(2)(b) and section 54 of the *Income Tax Act* (the "*Act"*)[1].

[2] The Minister of National Revenue ("the Minister") disagreed and treated the income from the disposition of the five houses as income from a business or from an adventure in the nature of trade pursuant to subsection 9(1) of the *Act*. Accordingly, the Minister reassessed Mr. Hansen's income for the taxation years including the amounts of $69,801, $273,434, $403,776, $54,913 and $187,574 respectively as income.

[3] The reassessments for the taxation years 2007, 2008 and 2009 were issued after the normal reassessment period. The Minister justified it on the basis that Mr. Hansen had made misrepresentations attributable to neglect, carelessness or willful

[1] I have annexed the provisions to my Reasons for Judgment.

default in reporting his income for the taxation years pursuant to subparagraph 152(4)(a)(i) of the *Act.*

[4] The Minister also levied penalties for all the taxation years in issue under subsection 163(2) of the *Act* on the basis that Mr. Hansen had knowingly or under circumstances amounting to gross negligence, made a false statement or omission in filing his income tax returns.

[5] At trial, the respondent conceded that should this Court find that Mr. Hansen's gain from the sale of the houses was on income account, Mr. Hansen should be taxed on 50% of the net proceeds, as he co-owned the properties in question on an equal basis with his spouse, Ms. Tania Weiland.

[6] At trial, the parties also filed a Partial Consent to Judgment for the 2009 and 2011 taxation years. Pursuant to this Partial Consent to Judgment, the appellant is entitled to deduct in his 2009 and 2011 taxation years the amount of $6,600 paid to his spouse Ms. Tania Weiland, as management fees. The appellant is also entitled to deduct for his taxation year 2009, the amount of $878 as advertising expenses.

[7] The trial was scheduled to continue on September 22, 2020. The only issue left to be determined was the adjusted cost basis ("ACB") of each property and in particular whether the appellant could include in computing the ACB any additional amounts over and above what the Minister of National Revenue had already allowed. On September 2nd, 2020, the parties informed the Court that they had reached an agreement on the ACB of the properties.

II. FACTS

[8] Mr. Hansen has a grade 9 education. From 1995 to 2010, he operated Concrete Works, a concrete pouring business, and later Dig-Rite, a foundation repair business.

[9] After completing high school, Ms. Weiland completed a course in hotel management. She currently works as a manager of two sales departments in a downtown Ottawa store. She has also worked as bookkeeper for Central Precast.

[10] Mr. Hansen and Ms. Weiland were unable to have children and therefore decided to adopt. Their first attempt at adopting proved unsuccessful and disheartening. In 2004 a young boy was placed in their care as the first step under an adoption program. However, during the Christmas season of 2004, the birth

mother decided that she did not want the adoption to proceed. The boy was removed from the care of the Hansens. This was a traumatic experience for the Hansens, as the child had become part of their family life.

[11] After this very difficult experience, the Hansens were approached by a social worker with respect to adopting twins. In 2005, after a through selection process, the birth mother selected the Hansens to adopt the twin baby girls. One of the conditions of the adoption was that Ms. Weiland stay at home until the children began school. The Hansens testified that the girls' welfare was at heart of the decisions they made, including with respect to housing.

[12] At the time of the adoption, the Hansens were living at 305 Mill Street, Merrickville, Ontario. They had been living there since 1999.

[13] The Hansens did not find the house suitable for raising young children. It had four-stories with the laundry in the basement. The staircases were steep, and Ms. Weiland testified that she was afraid of falling down them while carrying the babies. In addition, the location of the house was not ideal. It was close to the highway and far from Mr. Hansen and Ms. Weiland's parents. It was also located far from Mr. Hansen's place of work — he had to commute forty-five minutes to get to work. This was not ideal as Mr. Hansen worked long hours.

[14] The Hansens therefore sold the house in August 2006. They used Grapevine, an online website designed to sell homes commission free. The Minister did not reassess Mr. Hansen on the sale of this house.

6951 Lakeforest Walk, Greely, Ontario ("Lakeforest"),

[15] On April 8, 2006, the Hansens bought a house at 6951 Lakeforest Walk in Greely, Ontario. They moved into the house on August 18, 2006. The purchase price was $450,000.

[16] The Lakeforest house was a used single-level bungalow in a new development. The Hansens felt that the Lakeforest Walk area was a good place to raise young children, since it was a new subdivision and parks for children were planned.

[17] The Lakeforest house was also located closer to the Hansens' respective parents as well as to Mr. Hansen's place of work in Ottawa. His commute was reduced by 40 minutes per day.

[18] Once in the Lakeforest house, the Hansens personalized it to their liking. They painted the great-room chocolate brown and the girls' bedrooms pink. They installed various custom light fixtures and pot lights. They changed the countertop in the kitchen and in the bathroom to granite. They had a gas line installed for a gas-powered dryer, despite the fact that the house had come with an electric dryer. They bought new appliances, finished the deck that the builder had begun and painted the garage. They also took care of the landscaping, including planting trees, and had the laneway paved as required pursuant to a sale covenant.

[19] Not long after moving in, the Hansens became dissatisfied with the Lakeforest house and decided they had to move. The house was located close to an industrial site known as the Brenning Pit, which has a gravel excavation site and a timber mill. Large trucks from the Pit passed the house from approximately 6:00 am in the morning until late at night. The noise from the trucks was quite loud and the vibration from the trucks made the house shake. In addition, it created a large amount of dust. They also did not find the configuration of the house convenient for raising the girls. Ms. Weiland stated that it was difficult for her to keep an eye on the girls due to the house's configuration. The twin's bedrooms were located at the opposite end of the home from the master bedroom. In addition, the basement staircase was poorly located in the middle of the house. One of the girls pushed the baby gate and fell down the basement stairs.

[20] They, therefore, decided to sell the Lakeforest house. To that end, on January 21, 2007, five months after moving into the house, they purchased a lot located on Pebblewoods Drive, Manotick, Ontario.

[21] On April 19, 2007, the Hansens sold the Lakeforest house using Grapevine for $552,000. They moved out of the house on June 8, 2007, having lived there for approximately ten months.

6148 Pebblewoods Drive, Manotick, Ontario ("Pebblewoods")

[22] For the Pebblewoods house, the Hansens decided to construct a bungalow-style home and hired an architect to design custom plans. Both Mr. Hansen and Ms. Weiland testified that the house was their "dream home". The main level had 3000 square feet and the basement 1500 square feet. They moved into the house in early September 2007.

[23] At that time, the girls were two years old. The Hansens stated that the house was customized to their taste and for the girls' security and enjoyment. They

ensured that the staircase leading to the basement was located towards the back of the home for the girls' security. They also built the girls' bedrooms closer to the master bedroom to better keep an eye on the girls. They ensured that the girls' bedrooms were the same size with a connected bathroom between the rooms. The sinks in the bathroom were lowered so that the girls could use them without booster steps.

[24] The Hansens installed the floor joists closer than usual to prevent the floors from cracking. They raised the floors in the basement so that the basement would not feel cold and damp when the girls played there. They also built a playroom in the basement for the girls. They built a sound-proof theatre room. They had a TV installed in the island in the kitchen at a low height so that the girls could watch it. They installed eight-foot doors throughout the house. They installed granite counters and upgraded cupboards. The house had over seventy-five pot lights and at least thirty dimmer switches. A natural gas line was connected to the house to power both the BBQ and the dryer. They also installed a back-up generator. Both Mr. Hansen and Ms. Weiland testify that if they had been built the house with the intention of reselling it, they would not have added so many features and upgrades.

[25] The Hansens did not use a general contractor to build the house. Instead, Mr. Hansen hired and supervised individual tradespeople. He explained that he relied on referrals from contractors he had met while operating Concrete Works to find the tradespeople.

[26] Mr. Hansen was also involved in the construction of the house; he poured the concrete floors in the basement and garage himself, laid the brick for the fireplace, and cleaned up after the tradespeople every day.

[27] The Hansens paid $136,972 for the Pebblewoods lot including the purchase fees. They stated that the cost of construction was $605,123 for a total of $742,094.40.

[28] The Hansens testified that they quickly became unhappy with the neighborhood. They became concerned for the girls' security, due to a "coyote invasion" in Greely. They testified that coyotes often came near the houses, scavenging for garbage and other food. A neighbourhood boy was attacked by a coyote and a neighbour's dog killed. Ms. Weiland started to worry about the girls' safety and did not allow them to play outside. They had to give the family dog to her sister in law, because they were too afraid that a coyote would attack the dog.

At trial, the Hansens filed documents establishing that that there had been a coyote infestation in their neighbourhood at the time.

[29] In addition, according to the Hansens, houses on Pebblewoods Drive were subject to vandalism and the street seemed to be a favourite spot for teenagers to speed and race their cars.

[30] In light of these issues, the Hansens decided to sell. They listed the house with a real estate agent, Mr. James Wright, seven months after they had moved in and on May 2, 2008, they sold it for $870,000. They moved out on August 25, 2008.

[31] On May 12, 2008, the Hansens purchased the lot on which their next house would be built. It was also located in Manotick, at 1135 Meadowshire Way. The Hansens resided in the Pebblewoods house for eleven months that is from September 2007 to August 25, 2008.

1135 Meadowshire Way, Manotick, Ontario ("Meadowshire 1"),

[32] The Hansens paid $252,168 for the lot that they purchased on May 12, 2008 to build the Meadowshire 1 house. They stated that they incurred construction costs of approximately $605,000. After living in a trailer, they moved in the Meadowshire 1 house on September 13, 2008.

[33] The design of the Meadowshire 1 house was based on the same custom plan that had been drawn up for the Pebblewoods house, except that the master bedroom and the laundry room were larger and a loft was added over the garage to serve as Mr. Hansen's office for his business.

[34] The house was constructed in the same manner as the Pebblewoods house with Mr. Hansen hiring subcontractors and doing some of the work himself.

[35] Both Mr. Hansen and Ms. Weiland testified that soon after they had moved in, Mr. James Wright, the real estate agent who had sold the Pebblewoods house, approached them and asked if he could show Meadowshire 1 to his clients, Mr. Scott Murray and Ms. Catherine Murray ("the Murrays"). The Hansens initially declined Mr. Wright's request, as they did not want to sell. However, Mr. Wright persisted and eventually the Hansens agreed to allow a visit.

[36] When the Murrays visited the house, they immediately wanted to buy it. The Hansens stated that they initially refused to sell but when the Murrays insisted and made an offer of $1,150,000, they agreed to sell. The sale date was in May 2009 and the closing date was on September 14, 2009.

[37] Both Mr. Hansen and Ms. Weiland testified that they regretted agreeing to sell the Meadowshire 1 house and they approached Mr. Wright to see if they could rescind the sale. Mr. Wright advised them that if they did, they would be in breach of contract and would probably have to compensate the Murrays for cancelling the sale. Mr. Hansen and Mr. Weiland both testified that they also consulted a lawyer to see if they could rescind the sale contract. The Murrays were never made aware of these initiatives.

[38] Mr. Wright confirmed the Hansens' testimonies that they did not want to sell the house when he first approached them. He also confirmed that after they had agreed to sell the house, the Hansens approached him to see if they could rescind the sale. Due to possible monetary consequences, they decided to go ahead with the sale. Mr. Wright testified that in his estimation the Meadowshire 1 house was not built by the Hansens for the purposes of resale. In his view, a house built for resale does not include so many features and upgrades.

[39] Ms. Weiland stated that another factor that they took into consideration in selling the Meadowshire 1 house was that Mr. Hansen's health had declined. Initially, Mr. Hansen thought that he had Parkinson's disease, since his hands kept shaking. Following extensive medical testing, Mr. Hansen was diagnosed with vertigo and an essential tremor. The condition was largely attributable to the stress of operating his business. In light of this, Mr. Hansen decided to stop operating the business and sold it to a company on the condition that they retain his employees.

[40] Ms. Weiland testified that she was concerned that if Mr. Hansen could not work as much as he had in the past, they might not have the financial capacity to maintain a house as big as the Meadowshire 1 house in the future. That said, in cross-examination, she testified that they had financial capacity to keep the Meadowshire 1 house.

[41] The Hansens resided in the Meadowshire 1 house for 10 months, from November 12, 2008 until they moved out on September 14, 2009.

125 Cedardown Private, Nepean, Ontario ("Cedardown")

[42] After selling the Meadowshire 1 house, the Hansens rented a townhouse and started to look for a house to buy. At the time, Monarch Developments Inc. ("Monarch") was building townhouses on Cedardown Private in Nepean. This location suited the Hansens since their daughters did not have to change school.

[43] On June 5, 2009, the Hansens bought an end unit townhouse from Monarch at 125 Cedardown Private, Nepean. The price was $280,270.

[44] The Hansens moved into the house on December 2, 2009. They immediately made improvements by removing the carpet and installing hardwood on the main floor, installing Berber carpet in the basement, changing the kitchen counters to granite and installing a kitchen backsplash, having a gas line connected to the home for a gas dryer, installing a fence in the backyard, planting shrubbery, and building a backyard deck.

[45] Ms. Jessica Wright, the daughter of Mr. Wright, the real estate agent used by the Hansens, visited the Hansens to have them sign some documents relating to the sale of the Meadowshire 1 house. At the time, she was studying to become a real estate agent. Ms. Wright was taken by the improvements and the tasteful finishes made by the Hansens to the Cedardown house. She testified that she told the Hansens that if they ever sold the house, she would be interested in buying it. When asked in cross-examination why she thought Mr. Hansen would want to sell, she answered "I figured it would be a matter of time."

[46] As it turned out, the Cedardown house was not a good buy for the Hansens. Mr. Hansen's truck was too large to be parked properly in the laneway reserved for the townhouse leading to complaints from his next-door neighbour that the truck was taking up too much space. To resolve the issue, Mr. Hansen decided to park his truck in the guest parking area. This led the other neighbours to object, as they did not want Mr. Hansen to use the area to park his truck. In addition, the neighbours complained about the Hansens having loud social gatherings. Letters from the Hansen's neighbor, Mr. Mohammad Alsayyar, threatening to call the Ontario Provincial Police if the gatherings did not stop, were filed as evidence.[2]

[47] On April 25, 2010, the Hansens sold the Cedardown house to Ms. Wright for $339,947. No listing agent was involved. At that point, the Hansens had found another house — located at 512 Kilbirnie Drive, Nepean, Ontario. On January 10, 2011, the Hansens moved out of the Cedardown house.

---

[2] Book of Documents of the Appellant, Tab 80.

[48] The Hansens lived in the Cedardown house from December 2, 2009 to January 10, 2011, namely 13 months.

Purchase of a lot - 1136 Meadowshire Way, Manotick, Ontario

[49] On August 26, 2009, before moving out of the Meadowshire 1 house and into the Cedardown one, the Hansens purchased a lot at 1136 Meadowshire Way (Meadowshire 2), in Manotick. The lot was located just across from the Meadowshire 1 house. The sale transaction for the lot closed on September 30, 2009.

512 Kilbirnie Drive, Nepean, Ontario ("Kilbirnie")

[50] Mr. Hansen explained that while driving by the Monarch sales center in Nepean in February 2010, he noticed that Monarch had just released a new batch of single-family homes. He decided to visit and, seeing there was an available home, decided to purchase it. The house was located at 512 Kilbirnie Drive.

[51] The Hansens testified that they purchased the Kilbirnie house, a newly constructed single-family home from Monarch, almost by happenstance, seizing the opportunity to get out of their situation with the Cedardown house. They purchased it on February 10, 2010 but did not move in until January 2011. The purchase price was $400,646.

[52] They made improvements to the Kilbirnie house, such as installing a custom granite countertop in the kitchen, installing custom window coverings, partially finishing the basement, installing a gas line for a gas clothes dryer, installing a fiberglass pool, installing a fence, building a patio, and doing backyard landscaping.

[53] According to Mr. Hansen and Ms. Weiland, as was the case with the Cedardown house, the Kilbirnie house was not their dream home but they were happy with it until they could build the Meadowshire 2 house. They knew that it would take almost a year to build the house. In fact, the Hansens applied for a building permit to construct a house at Meadowshire 2 on April 14, 2011, four months after moving into the Kilbirnie house.

[54] The Hansens sold the Kilbirnie house on May 10, 2012 for $602,492 and moved out in July 2012. On May 27, 2011, the Hansens asked their financial institution for a loan in order to build the Meadowshire 2 house.

[55] The Hansens resided in the Kilbirnie house for 19 months; namely, from January 2011 to July 20, 2012.

[56] After selling the Kilbirnie house using Grapevine, Mr. Hansen and his family moved into the house at Meadowshire 2, where they were still residing at the time of trial.

[57] Mr. Hansen stated that for financial reasons, he was more involved in the construction of the Meadowshire 2 house than he had been for the earlier houses. He borrowed money from his parents to finish the house and repaid them after the Kilbirnie house was sold.

Testimony of Mr. Marsh

[58] Mr. Marsh is a certified professional accountant ("CPA"). He started working in accounting in 1975 primarily with the accounting firm of Kelley, Marsh & Associates. He has been the accountant of Mr. Hansen since 1996 and has had a business relationship with Ms. Weiland since the mid-1980's.

[59] Mr. Marsh met the Hansens on an annual basis to prepare their income tax returns. The Hansens always informed him of their house transactions. Mr. Marsh testified that he asked the Hansens why they had sold their house and their intentions with respect to their new house. He stated that if he had doubted the Hansens, he would have stopped working for them, since his policy was to work only with upstanding clients.

[60] Mr. Marsh recalled the reasons why the Hansens had sold their houses: the Lakeforest house being too close to the Brenning Pit, the problem with the coyotes with respect to the Pebblewoods house and the high unexpected offer made on the Meadowshire 1 house. He stated that taking into account the intention of the Hansens at the time of purchase and the circumstances which led them to sell the houses, he concluded that they qualified for the principal residence exemption and prepared their income tax returns accordingly.

Financing of the transactions

[61] The Hansens used a home equity line of credit ("HELOC") to finance the purchase of their homes. Unlike a traditional mortgage, which requires the payment of interest and principal, a HELOC requires only payment of interest for a period of time. In addition, a HELOC does not have a fixed term that locks a

borrower in for a fixed period. This flexibility allowed the Hansens to close a sale transaction without significant penalties.

[62] The evidence showed the Hansens usually obtained a HELOC when it was time to build their next house. For example, they mortgaged via a HELOC the Lakeforest house in order to build the Pebblewoods house. They took a HELOC on the Kilbirnie house to build the Meadowshire 2 house, namely, a few days after they had applied for a permit to build the latter house.

III. ISUES TO BE DECIDED

[63] There are four questions at issue:

a) Whether the Minister was entitled to reassess the 2007, 2008 and 2009 taxation years pursuant to subparagraph 152(4)(a)(i) of the *Act*, that is, after the normal reassessment period;

b) Whether Mr. Hansen's gain from the sale of the houses was business income, an adventure or concern in the nature of trade, or a capital gain subject to the principal residence exemption for the taxation years 2007, 2008, 2009, 2011 and 2012;

c) If the gain was business income or an adventure in the nature of trade, whether the Minister correctly denied some of the expenses claimed by Mr. Hansen with respect to the sale transactions;

d) If the gain was business income or adventure in the nature of trade, whether the Minister correctly assessed the penalties under subsection 163(2) of the *Act*.

IV. POSITION OF THE PARTIES

[64] Mr. Hansen submits that the Minister could not reassess him after the normal reassessment period for the 2007, 2008 and 2009 taxation years as he did not make a misrepresentation within the meaning of subparagraph 152(4)(a)(i) of the *Act*. He consulted a CPA, Mr. Marsh, to obtain professional advice at the time of filing his income tax returns. He explained to Mr. Marsh in a forthright manner that his intentions were to stay in the houses, but for legitimate reasons and circumstances beyond his control, he and his spouse had decided to sell the houses. In light of the explanations given by Mr. Hansen, Mr. Marsh advised him that he was entitled to claim the principal residence exemption.

[65] At the time of each purchase, Mr. Hansen argues that it is clear that he and his spouse's motivation was not sell the houses. If their motivations had been to sell the houses at a profit, they would have not customised the houses and added the many upgrades. Mr. Hansen submits that all the decisions that he and his spouse made with respect to the houses were primarily motivated by concerns they had for their girls. Accordingly, their motivation in selling each house was not to make a profit, as in an adventure or concern in the nature of trade, and even less so as a business. Hence, the sale proceeds were on account of capital, and as permitted by paragraph 40(2)(b) of the *Act*, exempt from taxation because the houses were their principal residences.

[66] Mr. Hansen submits that the Minister was not justified in reassessing him after the normal reassessment period for the 2007, 2008 and 2009 taxation years. When a taxpayer has thoughtfully, deliberately and carefully assessed the situation and has filed based on what he or she believes *bona fide* to be the proper method, the Minister cannot open statute-barred years because she does not agree on how a taxpayer has reported his or her income.

[67] If this Court were to find that the sales were on the account of business income, Mr. Hansen submits that he should be entitled to deduct additional expenses than what the Minister has already allowed.

[68] The respondent submits that Mr. Hansen made a misrepresentation attributable to neglect, carelessness or wilful default in reporting income for the years 2007, 2008 and 2009. Accordingly, the Minister was justified in reassessing him after the normal reassessment period. Mr. Hansen had enough experience in the construction field to be aware that he was engaged in the business of selling houses or in an adventure in the nature of trade. His intention when buying the houses was to sell them at a profit.

[69] The respondent submits that the Hansens sold five homes from 2006 to 2012. The income that the Hansens made on each house exceeded the income gained by Mr. Hansen's business in the year that the sales occurred. Mr. Hansen was working in the construction field. He knew that the market for houses was good. The Hansens were buying or building homes in popular neighbourhoods. In addition, the Hansens used the HELOC to finance their business venture to avoid paying penalties. Therefore, Mr. Hansen made a misrepresentation by omitting to report the income arising from the sale of the houses.

[70] As for penalties, the respondent submits Mr. Hansen knew or ought to have known that he had to report the income arising from the sales of the houses as business income or an adventure in the nature of trade. In addition, Mr. Hansen was also grossly negligent in not reporting the income arising from the sales of the houses since a person with his experience would have known to report the sales' income as business income. Therefore, the Minister was justified in imposing penalties under subsection 163(2) of the *Act* for every taxation year in issue.

[71] With respect to the penalties, Mr. Hansen submits he did not under report his income, and as such, the penalties are not justified.

V. LAW AND ANALYSIS

Statute-barred years 2007, 2008 and 2009 taxations years — Lakeforest, Pebblewoods and Meadowshire

[72] The provision that allows the Minister to reassess after the normal assessment period is subparagraph 152(4)(a)(i) of the *Act*. It states as follows:

> Assessment and reassessment
>
> 152 (4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if
>
> a) the taxpayer or person filing the return
>
> (i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act,
>
> [Emphasis added.]

[73] The Minister reassessed Mr. Hansen's 2007, 2008 and 2009 taxation years after the normal reassessment period. Accordingly, the sale transactions with respect to the Lakeforest, Pebblewoods and Meadowshire 1 houses were reassessed after the normal period for assessing a taxpayer.

[74] On the other hand, the Minister was within the time limit prescribed by the *Act*, to reassess the sale transactions with respect to the Cedardown house in 2011 and the Kilbirnie house in 2012.

[75] When the Minister assesses a taxpayer after the normal reassessment period, she has the burden of establishing that the taxpayer made a misrepresentation that is attributable to neglect, carelessness or wilful default. It is clear from the case law that the Minister cannot open statute-barred years simply because she does not agree with the manner in which a taxpayer has reported his or her income.

[76] The case law does not consider that there has been misrepresentation as contemplated by subparagraph 152(4)(i) of the *Act* when a taxpayer has been reasonable in the manner that he or she has reported his or her income. This reasoning is found in the decision of *Regina Shoppers Mall Ltd.* v *R*,[3] in which Justice Addy of the Federal Court stated that Minister cannot reassess after the normal assessing period, where a taxpayer thoughtfully, deliberately and carefully assesses the situation and files on what he or she believes *bona fide* to be the proper method:

> 10. Where a taxpayer thoughtfully, deliberately and carefully assesses the situation and files on what he believes bona fide to be the proper method there can be no misrepresentation as contemplated by section 152 (*1056 Enterprises Ltd. v. Canada*, [1989] 2 C.T.C. 1, 89 D.T.C. 5287). In *Levy* (*J.*) v. *Minister of National Revenue*, [1989] 2 C.T.C. 151, 89 D.T.C. 5385 at page 176 (D.T.C. 5403), Teitelbaum, J. quotes with approval the following statement by Muldoon, J. in the above case:
>
> > Subsection 152(4) protects such conduct, and perhaps only such conduct, where the taxpayer thoughtfully, deliberately and carefully assesses the situation as being one in which the law does not exact the reporting of that which the taxpayer bona fide believes does not exist.
>
> [Emphasis added.]

[77] Other decisions have followed and broadly interpreted the principle propounded in *Regina Shoppers Mall*. In *Cameron* v *The Queen*,[4] Mr. Cameron purchased and sold seven properties between 1996 and 2003. Justice Hogan of this

---

3 *Regina Shoppers Mall Ltd. v R*, [1990] 2 CTC 183 (FC), confirmed by the FCA at [1991] 1 CTC 297.

4 *Cameron v The Queen*, 2011 TCC 107.

Court held that because the taxpayer had taken "a thoughtfully considered position", the Minister was not entitled to reassess beyond the normal reassessment period even if she took a different position. Justice Hogan wrote:

> [18] Regarding real property, the Act does not provide any criteria to distinguish a capital gain from business income from a commercial transaction. Each case is different and the circumstances surrounding it must be reviewed to address the issue. In *Happy Valley Farms Ltd. v. The Queen*, the Court considered the following factors in determining whether the sale of real property was income:
>
> a) The nature of the property sold and how the taxpayer used it;
>
> b) The length of the ownership period;
>
> c) The frequency or number of other similar transactions by the taxpayer;
>
> d) The work expended on or in connection with the property;
>
> e) The circumstances giving rise to the sale of the property; and
>
> f) The taxpayer's motive regarding the sale of the property at the time of purchase.
>
> [19] The CRA auditor focused on the second and third factors to justify his findings. Even if the circumstances that led to the sale could be interpreted as supporting the respondent's position, the real question is whether subparagraph 152(4)(*a*)(i) applies to a taxation year that is otherwise time-barred when the facts considered incorrect are presented because the taxpayer interpreted the circumstances to favour the non-taxation theory since they fall in the grey zone of tax law. It would appear that the case law allows us to answer this question in the negative when the taxpayer's position is not unreasonable.
>
> [20] The starting point is *Regina Shoppers Mall Limited v. The Queen*, a Federal Court decision. The central issue in that case was whether the taxpayer should have included the profit of the sale of a lot in its income tax return as a capital gain or as income. The taxpayer had included it as a capital gain, and the Minister found that there was a misrepresentation that allowed him to assess after the normal period. Addy J., at paragraph 10 of the decision, explained that when a taxpayer files an income tax return on what he believes to be the proper method, after thoughtful, deliberate and careful assessment, there can be no misrepresentation. This position was accepted by the Federal Court of Appeal at paragraph 7 of its decision.
>
> [21] Moreover, at paragraph 15 of his judgement, Addy J. explained that the act does not impose on taxpayers the duty to report in a manner which the

> Minister prefers. If the taxpayer carefully considers his position and does not attempt to deceive the Minister, there is no misrepresentation.

[78] While *Petric v The Queen*[5] concerned the fair market value of the property and not the issue of capital gain or income, the Court adopted the same approach to the Minister's power to reassess outside the limitation period. Justice Lamarre stated:

> 38 . . . The matter of fair market value is a controversial issue, to be settled on the basis of the interpretation of the facts in evidence, as is the question of whether proceeds of disposition should be characterized as income or as a capital gain (*Regina Shoppers Mall Limited*) or of whether corporations are associated (*1056 Enterprises Ltd.*) . . .

[79] And later, she added:

> 40 Although fair market value is ultimately a question of fact to be resolved by the trier of fact, it is mostly a question of opinion answered by analysing different methodological approaches. Certainly the Minister is entitled to disagree with a taxpayer's view of fair market value and can reassess, within the limitation period, on the basis of his own evaluation. However, where the issue is whether the Minister should be allowed the benefit of an exception to the application of the limitation period, it must be shown that the taxpayer made a misrepresentation in filing his or its tax return.

[80] In *Savard v The Queen*,[6] this Court again stated that taxpayers have the right to disagree with the Minister in their interpretation of the *Act*, without this necessarily being considered a misrepresentation. Justice Tardif stated:

> 78 Does a person have to include, when he or she fills out a tax return, everything that might be income, based not on his or her own analysis but on speculation as to what the Agency might want to attribute to him or her? I do not believe so. In this case, there was enough information to justify the interpretation adopted by the appellant: that he had no obligation to declare the payments of fees by his employer as taxable benefits. In fact, the debate as to who really benefited from the services for which the fees were paid is clear evidence of how complex the case was and how much confusion surrounded it.

[81] Recently, in *Chaumont v The Queen*,[7] the taxpayer's interpretation was incorrect, but the fact he had acted in good faith lead the Court to find that there was no misrepresentation. Justice Tardif stated:

---

5 *Petric v The Queen*, 2006 TCC 306.

6 *Savard v The Queen*, 2008 TCC 62.

> 15 Although the appellant's submissions were unusual and even surprising, they were neither far-fetched nor unreasonable enough for it to be concluded that he made a wilful default or mistake with the intent to escape from his Canadian tax obligations.
>
> 16 Firstly, he expressed his objection, and secondly, he took initiatives to show that his allegations had merit, while taking into consideration the fact that certain income, specifically, pension income paid to a citizen who lives in a country other than the one that pays the pension, is not taxed.
>
> . . .
>
> 18 To conclude that the appellant's conduct was a wilful default or that it constituted a sufficient error to permit the Minister to assess beyond the normal period, would affect any taxpayer's right to contest the merits of an assessment, and would cause the limitation period imposed by Parliament to be essentially theoretical.

[82] It is clear from the above-noted decisions that simply because a taxpayer has adopted a position that contradicts the Minister's position does not in itself mean a taxpayer has made a misrepresentation that would allow the Minister to reassess after the normal period for reassessing a taxpayer.

[83] As was the case in *Cameron*, in the appeal at bar, the auditor's analysis for reopening the statute-barred years focussed on the length of the ownership period and the number of similar transactions and gave insufficient consideration to the central question of whether the taxpayer carefully considered his position and attempted to deceive the Minister.

[84] In addition, the case law as to whether amounts from the sale of a residence should be treated as business income or exempt capital gain (principal residence exemption) demonstrates that there is no hard and fast rule. Each case must be determined according to its particular facts and on its own merits.

[85] In some decisions, the Court has determined that despite a taxpayer engaging in the successive sale of several residences, they can benefit from the principal residence exemption (see *Cameron v The Queen* and *Palardy v The Queen*[8]). In other decisions, the Court considered that successive sales should be treated as giving rise to business income (see *Cayer v The Queen*[9]).

---

7 *Chaumont v The Queen*, 2009 TCC 493.

8 *Palardy v The Queen*, 2011 TCC 108.

[86] The question that I have to decide is whether Mr. Hansen thoughtfully, deliberately and carefully assessed the situation and filed his income tax returns on what he believed *bona fide* to be the proper method.

[87] Here, Mr. Hansen had a *bona fide* belief that the sale of the houses qualified for the principal residence exemption. The Hansens lived in each house and personalized each to their likings and taste. In addition, Mr. Hansen sought advice from his long-standing accountant, Mr. Marsh, who confirmed that the houses qualified for the principal residence exemption. The accountant confirmed this after seeking information from Mr. Hansen as to why they bought and sold each residence. The respondent did not introduce any evidence to rebut the accountant's account of the events.

[88] The respondent called Ms. Mota and Mr. Murray as witnesses to discredit the Hansens' testimonies.

[89] Ms. Mota is the spouse of the contractor who sold the Lakeforest house to the Hansens. She stated that while living in the Lakeforest house, she was not inconvenienced by the house being close to the Brenning Pit. She did not notice any dust or that the house shook. The only trucks that she saw were the ones associated with the construction of houses on the street. That said, she admitted that she was away working during the day, although when home on sick leave she did not notice the issues mentioned by the Hansens.

[90] After selling the Lakeforest house to the Hansens, Ms. Mota moved to a home on Pebblewoods Drive in Manotick, where the Hansens had also resided (the Pebblewoods house). She stated that while she did hear coyotes in the distance, it was not a regular occurrence and never kept her from sleeping or woke up her. She also testified that she saw her neighours' children playing on their lawns and waiting for the school bus during and after the Hansens' family resided on Pebblewoods.

[91] I do not question Ms. Mota testimony. That said, people react differently to issues. Some people will not be inconvenienced by noise, by the house shaking when a truck goes by or by vandalism, but others will. With respect to Pebblewoods area, the evidence showed that there was an infestation of coyotes. This may not have worried Ms. Mota, but it did worry Ms. Weiland who was the type who worried easily for her girls, due in part to her own personal

---

[9] *Cayer v The Queen*, 2007 TCC 136.

circumstances. At that time, the girls were still young and she did not feel comfortable letting them play outside.

[92] Mr. Murray purchased the Meadowshire 1 house from the Hansens. Mr. Murray explained that Mr. Wright had given him a price range at which the Hansens would entertain a sale (a range of between $1.1 - 1.3M). Mr. Wright corroborated this testimony and Mr. Hansen did not deny it, though he said he did not remember doing so. In my view, this does not change the nature of the transaction. The Hansens never thought that a purchaser would be ready to pay such an amount for the Meadowshire 1 house. The evidence showed that the Hansens immediately regretted selling the house and that after selling it, planned to go back and live on Meadowshire Way in Manotick, which they in fact did.

[93] In light of the facts, I conclude that Mr. Hansen did not make a misrepresentation attributable to neglect, carelessness or wilful default. Accordingly, the Minister could not reassess Mr. Hansen after the normal reassessment period for the taxation years, 2007, 2008 and 2009 for the sales of the Lakeforest, Pebblewoods and Meadowshire 1 houses.

2011-2012 taxation years — Cedardown and Kilbirnie

[94] Under subsection 248(1) of the *Act,* a business includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, except for the purposes of paragraph 18(2)(*c*), an adventure or concern in the nature of trade but does not include an office or employment.

[95] An "adventure in the nature of trade" is not defined in the *Act*. The concept of an adventure in the nature of trade is a judicial creation designed to determine which purchase and sale transactions are of a business nature and which are of a capital nature.

[96] The Supreme Court of Canada decided in *Friesen v Canada*[10] that the first requirement for an adventure in the nature of trade is that it involve a "scheme for profit-making". The taxpayer must have a legitimate intention of gaining a profit from the transaction.

---

10 *Friesen v Canada,* [1995] 3 SCR 103.

[97] In *Happy Valley Farm Ltd. v Minister of National Revenue*,[11] Justice Rouleau of the Federal Court set out factors to consider whether a property is purchased as a capital asset or as an adventure in the nature of trade:

> 1. The nature of the property sold. Although virtually any form of property may be acquired to be dealt in, those forms of property, such as manufactured articles, which are generally the subject of trading only are rarely the subject of investment. Property which does not yield to its owner an income or personal enjoyment simply by virtue of its ownership is more likely to have been acquired for the purpose of sale than property that does.
>
> 2. The length of period of ownership. Generally, property meant to be dealt in is realized within a short time after acquisition. Nevertheless, there are many exceptions to this general rule.
>
> 3. The frequency or number of other similar transactions by the taxpayer. If the same sort of property has been sold in succession over a period of years or there are several sales at about the same date, a presumption arises that there has been dealing in respect of the property.
>
> 4. Work expended on or in connection with the property realized. If effort is put into bringing the property into a more marketable condition during the ownership of the taxpayer or if special efforts are made to find or attract purchasers (such as the opening of an office or advertising) there is some evidence of dealing in the property.
>
> 5. The circumstances that were responsible for the sale of the property. There may exist some explanation, such as a sudden emergency or an opportunity calling for ready money, that will preclude a finding that the plan of dealing in the property was what caused the original purchase.
>
> 6. Motive. The motive of the taxpayer is never irrelevant in any of these cases. The intention at the time of acquiring an asset as inferred from surrounding circumstances and direct evidence is one of the most important elements in determining whether a gain is of a capital or income nature.

[98] In *Canada Safeway Limited v HMQ*,[12] Justice Nadon of the Federal Court of Appeal stated that although the Courts have used different factors to determine whether a transaction constituted an adventure in the nature of trade, the most determinative factor is the intention of the taxpayer when acquiring the property. He stated as follows:

---

11 *Happy Valley Farm Ltd. v Minister of National Revenue,* [1986] 2 CTC 259.

12 *Canada Safeway Limited v HMQ,* 2008 FCA 24.

> 43. [A]lthough the courts have used various factors to determine whether a transaction constituted an adventure in the nature of trade or a capital transaction, namely, those found in IT-218R, the most determinative factor is the intention of the taxpayer at the time of acquiring the property. If that intention reveals a scheme for profit-making, then the Court will conclude that the transaction is an adventure in the nature of trade.

[99] With respect to intention, the Court has to consider not only if the primary intention of a taxpayer reveals a scheme for making profit at the time of purchase, but also if the taxpayer had a secondary intention at the time of purchase. The secondary intention concept is discussed in *Happy Valley Farms Ltd.*[13], where Justice Addy reproduced the following summary of the test from *Racine et al v Minister of National Revenue*:[14]

> . . . the fact alone that a person buying a property with the aim of using it as capital could be induced to resell it if a sufficiently high price were offered to him, is not sufficient to change an acquisition of capital into an adventure in the nature of trade. In fact, this is not what must be understood by a "secondary intention" if one wants to utilize this term.
>
> To give to a transaction which involves the acquisition of capital the double character of also being at the same time an adventure in the nature in trade, the purchaser must have in his mind, at the moment of the purchase, the possibility of reselling as an operating motivation for the acquisition; that is to say that he must have had in mind that upon a certain type of circumstances arising he had hopes of being able to resell it at a profit instead of using the thing purchased for purposes of capital. Generally speaking, a decision that such a motivation exists will have to be based on inferences flowing from circumstances surrounding the transaction rather than on direct evidence of what the purchaser had in mind.

[Emphasis added.]

[100] During the 2011 and 2012 taxation years, Mr. Hansen sold two homes: the ones at Cedardown and Kilbirnie. I accept that Mr. Hansen may have sold the Cedardown house due to neighbourly disputes and the prospect of moving into a larger home. It also makes sense that once the Meadowshire 2 house was completed, the Kilbirnie house was sold.

[101] However, I am of the view that Mr. Hansen's primary intention at the time of purchase of both the Cedardown and Kilbirnie houses was to resell them at a

---

13 *Happy Valley Farms Ltd., supra* Note 13.

14 *Racine et al v Minister of National Revenue,* [1965] CTC 150.

profit. If it was not his primary intention, then the possibility of reselling them at profit was certainly a secondary intention motivating him to purchase both houses.

[102] The evidence shows that the Hansen had in mind the possibility of reselling the Cedardown and the Kilbirnie houses as an operating motivation for their acquisition. The Hansens intended to build a house on Meadowshire Way in Manotick. They purchased the lot for building the Meadowshire 2 house before moving into the Cedardown house and before buying the Kilbirnie house. They obtained a building permit for building the Meadowshire 2 house four months after moving into the Kilbirnie house.

[103] Both Mr. Hansen and Ms. Weiland testified that they always meant to move to the Meadowshire 2 house and live there once the construction of the house was completed. Mr. Hansen dealt with the Cedardown and Kilbirnie houses in a business-like way: he selected newly built homes that would be easier to sell, leveraged his construction industry experience to make improvements that would attract future buyers and picked homes in desirable markets. Mr. Hansen also used a HELOC because it allowed him to close while avoiding the payment of penalties.

[104] Also, Mr. Hansen's explanation of the circumstances surrounding the purchase of the Kilbirnie house support the conclusion that his intent was to buy it for resale. He happened to see a line of people waiting for hours for a chance to purchase one of the new pre-construction homes that were being offered for sale by Monarch. This prompted him to go and enquire if any units were still available. He, therefore, knew that there was a market for these houses. Despite the enthusiasm for the units, some became available when prospective buyers were not able to obtain a mortgage from their financial institutions.

[105] The preponderance of the evidence plays in favour of the respondent. Mr. Hansen did not establish that he and his spouse's intentions when purchasing the Cedardown and Kilbirnie houses was not to resell them at a profit. In my view, their intentions was to sell the houses at profit.

[106] Therefore, the principal residence exemptions do not apply to the Cedardown and Kilbirnie houses. The proceeds of the sale for both should be treated as income pursuant to subsection 9(1) of the *Act*.

Expenses with respect to Cedardown and Kilbirnie houses

[107] With respect to the Cedardown house, the parties agreed to allow an additional expense in the amount of $8,531 in relation to the HST paid to acquire the property.

[108] With respect to the Kilbirnie house, the parties agreed to allow an additional expense in the amount of $54,387.53 in relation to exterior and interior improvements.

VI. PENALTY PURSUANT TO SECTION 163(2) OF THE *ACT*

[109] Since I decided that the respondent did not establish that Mr. Hansen made a misrepresentation in his income tax returns and that the Minister was not entitled to open statute barred years, Mr. Hansen was entitled to claim the personal residence exemption for the taxation years 2007, 2008 and 2009. Therefore, my analysis with respect to the imposition of the penalties under subsection 163(2) of the *Act* will apply only to the sales of the Cedardown and Kilbirnie houses in the taxation years 2011 and 2012, respectively.

[110] Subsection 163(2) of the *Act* authorizes the Minister to impose a penalty on a taxpayer if the latter knowingly or under circumstances amounting to gross negligence makes a false representation or an omission when filing his or her income tax return. It states as follows:

> 163(2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of $100 and 50% of the total of
>
> . . .

[111] Pursuant to subsection 163(3) of the *Act*, the respondent has the burden of proving on a balance of probabilities the facts that justify the assessment of a penalty.

[112] Accordingly, in this appeal the respondent has to establish:

- that Mr. Hansen made a false statement or omission in his income tax returns; and

- that he did so knowingly or under circumstances amounting to gross negligence.

[113] The standard of "gross negligence" is different from that of "knowingly/willful blindness".

[114] In *Bradshaw v The Queen,*[15] I considered the decision of the Federal Court of Appeal in *Wynter v The Queen,*[16] which examined the concept of wilful blindness:

> [41] In *Wynter,* Justice Rennie explained that a taxpayer will fall under the "knowingly" standard, not only when the taxpayer actually intends to make a false statement but also when the taxpayer becomes aware of the need for inquiry but declines to make the inquiry because the taxpayer does not want to know the truth or wants to studiously avoid the truth. In these circumstances, the doctrine of willful blindness imputes knowledge to the taxpayer:
>
> > [13] A taxpayer is willfully blind in circumstances where the taxpayer becomes aware of the need for inquiry but declines to make the inquiry because the taxpayer does not want to know, or studiously avoids, the truth. The concept is one of deliberate ignorance: *R. v. Briscoe*, 2010 SCC 13 at paras. 23-24, [2010] 1 S.C.R. 411 (*Briscoe*); *Sansregret* at para. 24. In these circumstances, the doctrine of wilful blindness imputes knowledge to a taxpayer: *Briscoe* at para. 21. Wilful blindness is the doctrine or mechanism by which the knowledge requirement under subsection 163(2) is met.
> >
> > . . .
> >
> > [16] In sum, the law will impute knowledge to a taxpayer who, in circumstances that suggest inquiry should be made, chooses not to do so. The knowledge requirement is satisfied through the choice of the taxpayer not to inquire, not through a positive finding of an intention to cheat.
> >
> > [17] While evidence, for example, of an actual intent to make a false statement would suffice to meet the "knowingly" requirement of subsection 163(2), requiring an intention to cheat to establish wilful blindness is inconsistent with the well-established jurisprudence that wilful blindness pivots on a finding that the taxpayer deliberately chose not to make inquiries in order to avoid verifying that which might be such an inconvenient truth. The essential factual element is a finding of

---

15 *Bradshaw v The Queen,* 2019 TCC 1.

16 *Wynter v The Queen,* 2017 FCA 195.

> deliberate ignorance, as it "connotes 'an actual process of suppressing a suspicion'": *Briscoe* at para. 24. I would add that, in the context of subsection 163(2), references to "an intention to cheat" are a distraction. The gravamen of the offence under subsection 163(2) is making of a false statement, knowing (actually or constructively, i.e., through wilful blindness) that it is false.

[115] Wilful blindness will therefore be established if the respondent establishes on a balance of probabilities that the taxpayer subjectively knew that the statements in his or her income tax return were false but chose not to make further inquiries because he or she subjectively knew or strongly suspected that the inquiries would provide him or her with the knowledge that the statements were indeed false. Since it is a subjective test, the personal attributes of the individual may be considered in determining whether the individual is wilfully blind.

[116] On the other hand, the "gross negligence" standard is an objective test. Gross negligence will be established by taking into account the expected conduct of a reasonable person in the same circumstances. Consequently, the personal attributes of a taxpayer should not be taken into account. The burden is on the Crown to prove on a balance of probabilities that the conduct of a taxpayer represented a marked and substantial departure from the conduct of a reasonable person in the same circumstances.

[117] The seminal decision on what constitutes gross negligence under subsection 163(2) of the *Act* is the Federal Court's decision in *Venne v The Queen.*[17] There, Justice Strayer described what constitutes gross negligence in the following terms:

> Gross negligence must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not.

[118] In *Sidhu v The Queen,*[18] Justice Hershfield stated as follows:

> . . . The burden here is not to prove, beyond a reasonable doubt, *mens rea* to evade taxes. The burden is to prove on a balance of probability such an indifference to appropriate and reasonable diligence in a self-assessing system as belies or offends common sense. . . .

---

17 *Venne v The Queen*, [1984] CTC 223, at paragraph 37.

18 *Sidhu v The Queen*, 2004 TCC 174.

[119] Chief Justice Bowman in *Mensah v The Queen*[19] stated that while the standard of proof in a tax appeal is a civil one and not a criminal one, nonetheless the evidence adduced in support of the penalty must be scrutinized with great care. He also referred to the decision of the Federal Court of Appeal in *Farm Business Consultants Inc. v R*[20] which held that the benefit of the doubt in such cases must be given to the taxpayer:

> A court must be extremely cautious in sanctioning the imposition of penalties under subsection 163(2). Conduct that warrants reopening a statute-barred year does not automatically justify a penalty and the routine imposition of penalties by the Minister is to be discouraged. Conduct of the type contemplated in paragraph 152(4)(*a*)(i) may in some circumstances also be used as the basis of a penalty under subsection 163(2), which involves the penalizing of conduct that requires a higher degree of reprehensibility. In such a case a court must, even in applying a civil standard of proof, scrutinize the evidence with great care and look for a higher degree of probability than would be expected where allegations of a less serious nature are sought to be established. Moreover, where a penalty is imposed under subsection 163(2) although a civil standard of proof is required, if a taxpayer's conduct is consistent with two viable and reasonable hypotheses, one justifying the penalty and one not, the benefit of the doubt must be given to the taxpayer and the penalty must be deleted. I think that in this case the required degree of probability has been established by the respondent, and that no hypothesis that is inconsistent with that advanced by the respondent is sustainable on the basis of the evidence adduced.
>
> [Emphasis added.]

[120] I will now apply the reasoning of these decisions to the facts of this appeal.

Knowingly or wilfully blind

[121] I am of the view that the respondent did not establish that Mr. Hansen met the "knowingly" requirement as required by subsection 163(2) of the *Act.*

[122] Mr. Hansen stated that he sold the Cedardown house because of the issues he had with his neighbours and the Kilbirnie house so that the Hansens could move into their dream home at Meadowshire 2. In light of these circumstances, Mr. Hansen believed that he was correctly reporting his income.

---

19 *Mensah v* The Queen, 2008 TCC 378.

20 *Farm Business Consultants Inc. v R,* 95 DTC 200, confirmed by the FCA at 96 DTC 6085.

[123] In addition, Mr. Hansen, knowing that he was not familiar with the intricacies of tax law, consulted a CPA, Mr. Marsh, to ensure that his income was reported correctly. He relied on the advice of Mr. Marsh to claim the principal residence exemption for his 2011 and 2012 taxation years.

[124] In this appeal, Mr. Hansen, based on the advice of his accountant, was under the impression that he could claim the personal residence exemption. In my view, the respondent did not establish that Mr. Hansen knowingly make a false statement or omission when filing his income tax returns for the 2011 and 2012 taxation years.

[125] I am also of the view that Mr. Hansen was not wilfully blind. Unlike many the decisions of this Court,[21] where the taxpayer becomes aware of the need for inquiry but declines to make the inquiry because the taxpayer does not want to know the truth or avoid the truth, that was not the case here. Mr. Hansen consulted Mr. Marsh at the time of filing his income tax returns and explained the reasons for selling the houses and his intentions when purchasing the Cedardown and Kilbirnie houses. His opinion from this inquiry was that he was entitled to claim the principal residence exemption on both.

Grossly negligent

[126] As I stated earlier, the burden is on the respondent to establish on a balance of probabilities that the conduct of a taxpayer represented a marked and substantial departure from the conduct of a reasonable person in the same circumstances. In my view, the respondent failed to establish that Mr. Hansen was grossly negligent in reporting his income for the 2011 and 2012 taxation years as contemplated by subsection 163(2) of the *Act.*

[127] Mr. Hansen was of the view that he was entitled to claim the personal residence exemption. He did not deliberately set out to conceal the amounts arising from the sales of the Cedardown and Kilbirnie houses. He spoke openly to his CPA, Mr. Marsh, of his intentions when purchasing the houses and his reasons for selling them. Mr. Marsh advised him that he was entitled to claim the principal residence exemption on both. In the circumstances, I am of the view that Mr. Hansen's conduct did not represent a marked and substantial departure from the conduct of reasonable person in the same circumstances.

---

21 *Wynter*, *supra* Note 16; *Bradshaw*, *supra* Note 15.

[128] Gross negligence pursuant to subsection 163(2) of the *Act* must involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, or an indifference as to whether the law is complied with or not. Mr. Hansen did not act intentionally nor did the respondent establish that Mr. Hansen showed indifference as to whether the law was complied with or not. On the contrary, Mr. Hansen consulted a CPA and relied on his advice to claim the exemption. He was therefore not grossly negligent. In my view, this is the conduct of a reasonable person in the same situation.

[129] In addition, as stated by Justice Bowman in *Mensah v The Queen*,[22] even if Mr. Hansen's conduct was consistent with two viable and reasonable hypotheses, one justifying the penalty and one not, the benefit of the doubt must be given to the taxpayer and the penalty must be deleted.

[130] For these reasons, I am of the view that the respondent has not established that the Minister correctly levied the penalties with respect to the Cedardown and Kilbirnie houses.

VII. CONCLUSION

[131] The appeal is allowed on the following basis:

- The respondent did not establish that Mr. Hansen made any misrepresentation that is attributable to neglect, carelessness or wilful default as contemplated by subparagraph 152(4)(a)(i) of the *Act*. Therefore, the Minister did not have the authority to reassess Mr. Hansen after the normal period for reassessment for the sales transactions that occurred in 2007, 2008 and 2009 taxation years, namely, with respect to Lakeforest, Pebblewoods and Meadowshire 1. As a result, Mr. Hansen's claim for the principal residence exemption for these taxation years stands.

- Mr. Hansen is not entitled to claim the principal residence exemption for the sale transactions that occurred in 2011 and 2012 taxation years, namely, with respect to Cedardown and Kilbirnie. As a result, these transactions should be taxed pursuant to subsection 9(1) of the *Act*. However, the Minister has to take into account, that Mr. Hansen was a

---

22 *Mensah*, *supra* Note 19.

co-owner of these houses with Ms. Weiland. Mr. Hansen should be taxed on 50% of the net proceeds.

- In calculating the ACB for the Cedardown house, an additional amount of $8,531 is allowed as expenses.

- In calculating the ACB for the Kilbirnie house, an additional amount of $54,387.53 is allowed as expenses.

- The penalties levied by the Minister for the taxation years 2007, 2008, 2009, 2011 and 2012 are waived.

[132] Pursuant to the consent to Judgment filed by the parties at trial, the appellant is entitled to deduct in his 2009 and 2011 taxation years the amount of $6,600 paid to his spouse Ms. Tania Weiland, as management fees. The appellant is also entitled to deduct for his taxation year 2009, the amount of $878 as advertising expenses.

[133] The parties will have 30 days from the date of this Judgment to make submissions with respect to costs. Each party will have a further 10 days thereafter to file any responding submissions. If the parties do not advise the Court that they have reached an agreement and no submissions are filed by the appellant, costs shall be awarded in the amount set out in the Tariff of the *Tax Court of Canada Rules, (General Procedure)*.

Signed at Ottawa, Canada, this 14th day of September 2020.

"Johanne D'Auray"

D'Auray J.

ANNEX

40(2) Notwithstanding subsection 40(1),

. . .

(b) where the taxpayer is an individual, the taxpayer's gain for a taxation year from the disposition of a property that was the taxpayer's principal residence at any time after the date (in this section referred to as the "acquisition date") that is the later of December 31, 1971 and the day on which the taxpayer last acquired or reacquired it, as the case may be, is the amount determined by the formula

$$A - (A \times B/C) - D$$

where

A is the amount that would, if this Act were read without reference to this paragraph and subsections 110.6(19) and 110.6(21), be the taxpayer's gain therefrom for the year,

B is one plus the number of taxation years that end after the acquisition date for which the property was the taxpayer's principal residence and during which the taxpayer was resident in Canada,

C is the number of taxation years that end after the acquisition date during which the taxpayer owned the property whether jointly with another person or otherwise, and

D is

(i) where the acquisition date is before February 23, 1994 and the taxpayer or a spouse or common-law partner of the taxpayer elected under subsection 110.6(19) in respect of the property or an interest therein that was owned, immediately before the disposition, by the taxpayer, 4/3 of the lesser of

(A) the total of all amounts each of which is the taxable capital gain of the taxpayer or of a spouse of the taxpayer that would have resulted from an election by the taxpayer or spouse under subsection 110.6(19) in respect of the property or interest if

(I) this Act were read without reference to subsection 110.6(20), and

(II) the amount designated in the election were equal to the amount, if any, by which the fair market value of the property or interest at the end of February 22, 1994 exceeds the amount determined by the formula

E - 1.1F

where

E is the amount designated in the election that was made in respect of the property or interest, and

F is the fair market value of the property or interest at the end of February 22, 1994, and

(B) the total of all amounts each of which is the taxable capital gain of the taxpayer or of a spouse of the taxpayer that would have resulted from an election that was made under subsection 110.6(19) in respect of the property or interest if the property were the principal residence of neither the taxpayer nor the spouse for each particular taxation year unless the property was designated, in a return of income for the taxation year that includes February 22, 1994 or for a preceding taxation year, to be the principal residence of either of them for the particular taxation year, and

(ii) in any other case, zero;

54 In this Subdivision,

principal residence of a taxpayer for a taxation year means a particular property that is a housing unit, a leasehold interest in a housing unit or a share of the capital stock of a co-operative housing corporation acquired for the sole purpose of acquiring the right to inhabit a housing unit owned by the corporation and that is owned, whether jointly with another person or otherwise, in the year by the taxpayer, if

CITATION:	2020 TCC 102
COURT FILE NO.:	2017-1882(IT)G
STYLE OF CAUSE:	RICK HANSEN v HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	June 24, 25, 26 and 27, 2019
REASONS FOR JUDGMENT BY:	The Honourable Justice Johanne D'Auray
DATE OF JUDGMENT:	September 14, 2020

APPEARANCES:

Counsel for the Appellant:	Susan Tataryn Asha Bradford
Counsel for the Respondent:	Ana-Maria Tarres

COUNSEL OF RECORD:

For the Appellant:

Name:	Susan Tataryn Jean-Michel Cazabon
Firm:	Tataryn Law

For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada